Petition

81-926

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NO.

In The
Supreme Court Of The United States

NOVEMBER TERM, 1981

STATE OF CONNECTICUT
Petitioner

vs.

MITCHELL GORDON
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

AUSTIN J. McGUIGAN
Chief State's Attorney
Post Office Box 5000
Wallingford, Connecticut 06492
(203) 265-2373
Counsel of Record for Petitioner

With Whom On The Brief:

CARL SCHUMAN
Assistant State's Attorney
Office of the Chief State's Attorney

(a) QUESTION PRESENTED

Does Chapman v. California, 386 U.S. 18 (1967), permit a finding of harmless error when there is a violation of the rule of Stovall v. Denno, 388 U.S. 293 (1967), regarding the admission of unnecessarily suggestive and unreliable identification evidence, and, if so, was the error harmless in this case?

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(b) LIST OF ALL PARTIES

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(d) REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS

The official opinion of the Supreme Court of Connecticut is currently reported at 43 Connecticut Law Journal No. 7, p. 42 (Aug. 18, 1981) and appears in Petitioner's Appendix along with the supreme court's summary order, dated September 16, 1981, denying petitioner's motion to reargue. There was no written opinion of the trial court. An unofficial report of the proceedings is not yet available.

(e) GROUNDS ON WHICH JURISDICTION IS INVOKED

(i) The decision of the Supreme Court of Connecticut was released on August 18, 1981.

(ii) The Supreme Court of Connecticut denied petitioner's motion to reargue on September 16, 1981.

(iv) This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3) (1976).

(f) CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

United States Constitution
Sixth Amendment

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to

be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution
Fourteenth Amendment
Section One

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §1257(3) (1976)

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commissions

held or authority exercised under, the United States.

Rule 17.1
Revised Rules of the Supreme Court
of the United States

Considerations Governing Review on Certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by

this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Connecticut Constitution
Article First
Section Eight

In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his behalf; to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great; and in all prosecutions by indictment or information, to a speedy, public trial by an impartial jury. No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law, nor shall excessive bail be required nor excessive fines imposed. No person shall be held to answer for any crime, punishable by death or life imprisonment, unless on a presentment or an indictment of a grand jury, except in the armed forces, or in the militia when in actual service in time of war or public danger.

Connecticut Constitution
Article First
Section Nine

No person shall be arrested, detained or punished, except in cases clearly warranted by law.

Connecticut General Statutes
Section 52-265 (1981)

On an appeal or writ of error, if the supreme court of errors finds errors in the rulings or decisions of the court below or of a judge thereof when the jurisdiction of any action or proceeding is or shall be vested in him, and unless it is of the opinion that such errors have not materially injured the appellant or plaintiff in error, it may render judgment in favor of the appellant or plaintiff in error, together with his costs; or may remand the cause to the court below or to a judge thereof having jurisdiction, to be proceeded with by such court or by such judge to final judgment, in which case the whole costs, except the costs on the writ of error or appeal, shall be taxed in favor of the prevailing party, and the costs in the supreme court of errors shall be taxed in favor of the plaintiff in error or appellant. When the judgment is affirmed, or the appellant or plaintiff in error suffers a nonsuit or withdraws the cause, costs shall be adjudged to the defendant in error or appellee; provided the fee to the prevailing party and that for printing briefs shall be in the discretion of the court, upon the reservation of a cause for its advice, or when a new trial is granted, and all costs shall be taxed at its discretion in cases brought for equitable relief.

Connecticut General Statutes
Section 53a-70 (1981)

Sexual assault in the first degree: Class B felony. (a) A person is guilty of sexual assault in the first degree

when such person compels another person to engage in sexual intercourse by the use of force against such other person or a third person, or by the threat of use of force against such other person or against a third person which reasonably causes such person to fear physical injury to such person or a third person.

(b) Sexual assault in the first degree is a class B felony.

Connecticut General Statutes
Section 53a-134 (1981)

Robbery in the first degree: Class B felony. (a) A person is guilty of robbery in the first degree when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime: (1) Causes serious physical injury to any person who is not a participant in the crime; or (2) is armed with a deadly weapon; or (3) uses or threatens the use of a dangerous instrument; or (4) displays or threatens the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; except that in any prosecution under this subdivision, it is an affirmative defense that such pistol, revolver, rifle, shotgun, machine gun or other firearm was not a weapon from which a shot could be discharged. Nothing contained in this subdivision shall constitute a defense to a prosecution for, or preclude a conviction of, robbery in the second degree, robbery in the third degree or any other crime.

(b) Robbery in the first degree is a class B felony provided any person found guilty under subdivision (2) of subsection (2) shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court.

Connecticut General Statutes
Section 53a-136 (1981)

Robbery in the third degree: Class D felony. (a) A person is guilty of robbery in the third degree when he commits robbery.

(b) Robbery in the third degree is a class D felony.

(g) STATEMENT OF THE CASE

In a three-to-two decision, the Supreme Court of Connecticut held that the admission of unreliable identification evidence in violation of the due process clause can never constitute harmless error. State v. Gordon, ____Conn.____, 43 Conn. L.J. No. 7, p. 42 (Aug. 18, 1981). Thus despite what it labeled the "overwhelming" evidence of guilt, id. at 48, it reversed the robbery and rape conviction of a sixteen year old defendant.

On May 20, 1977, a thirty year old female was assaulted from behind while waiting for a morning commuter bus in Glastonbury, Connecticut. The assailant, who wore an orange ski mask, put a knife to her stomach, pushed her into an abandoned greenhouse, blindfolded her, and then raped her. At some point during the incident the assailant took ten dollars from the victim's purse, which she had dropped upon entering the greenhouse.

Soon after the culprit fled, the victim provided a partial description of him to local police. Two off-duty firemen, who had heard a police broadcast of that description, saw the defendant walking down a nearby road. He appeared to match the description. When a police car happened by and the defendant began to run, the fireman gave chase. The chase ended in a back yard where the defendant, who was sixteen, sat down, pounded his fist on the ground, and began to cry.

The police soon arrived. The defendant stood up and volunteered, "I don't know why I touched her." An officer then patted him down and felt a hard object in his pants pocket. In response to a request to hand it over, the defendant gave the officer a jackknife and a ten dollar bill and said he had stolen the money from the victim. He was then placed under arrest.

The police brought the defendant to the house where the victim sought refuge. With the defendant seated in the back of a police car some thirty feet away, the victim declined to make an identification. She did agree, however, to go to the police station to look at the defendant through a one-way window. Once there she observed the defendant standing alone in an adjoining room for several minutes. She stated that she was eighty percent certain that he was the rapist. Some ninety minutes had elapsed since the crime.

The state charged the defendant with sexual assault in the first degree, see Conn. Gen. Stat. § 53a-70(a)(2) (1981), and robbery in the first degree. See id. § 53a-134(a)(3) (1981). The defendant was tried by jury. All of the above evidence, along with an in-court identification by the victim, was admitted. In addition, the victim testified that the knife seized from the

defendant resembled the one thrust at her. The state's evidence also included lab reports revealing blood and seminal stains on the undergarments worn by the victim and the defendant at the time and the presence of spermatocytes in the victim's vaginal area.

While vigorously contesting the state's identification evidence outside the jury's presence, the defendant relied on an insanity defense once the state rested. The defendant elicited testimony from two of his own doctors that the defendant had not only admitted the sexual assault and robbery, but in fact had plotted the crime for three days before its actual commission.

The jury found the defendant guilty of sexual assault in the first degree and robbery in the third degree, a lesser included offense of the robbery charged. See id. § 53a-136(a) (1981). From a judgment committing the defendant to a state prison for a term not to exceed five years, the defendant took appeal to the Supreme Court of Connecticut.

The supreme court reversed and remanded for a new trial. State v. Gordon, ___ Conn. ____, 43 Conn. L.J. No. 7, p. 42 (Aug. 18, 1981). All five justices concurred that admission of the victim's out-of-court and in-court identifications was impropery. The court initially found the out-of-court procedures unnecessarily suggestive since they singled out the defendant when a lineup could have been assembled without damage to the state's investigation. Id. at 46. Applying the factors set out in Neil v. Biggers, 409 U.S. 188, 199-200 (1972), the court then determined that the out-of-court identifcation was unreliable and hence inadmissible. Id. at 46-47. The court concluded its inquity by holding that these out-of-court procedures fatally tainted the victim's in-court identification. Id. at 47. For the purposes of

this appeal, the state concedes the correctness of these rulings.

The court divided three to two on whether the erroneous admission of unreliable identification evidence could constitute harmless constitutional error. The majority concluded it could not, insisting that "sound judicial policy requires reversal whenever the erroneous admission of an unnecessarily suggestive and unreliable identification has violated a defendant's constitutional rights. Id. at 48. In dictum the court suggested that application of the harmless error rule would produce the same result. While conceding that the "evidence of the defendant's guilt [was] indeed overwhelming," the court was unable to find harmless error because it "could not say beyond a reasonable doubt that the jury totally ignored or decisively rejected [the victim's] plainly relevant identifications." Id.

The dissenters had little difficulty in deciding that harmless error analysis should apply to identification procedures. Id. at 49 (Armentano, J., dissenting and concurring). Their application of the doctrine to this case focused on the abundant evidence of identity that was wholly independent of the show-up procedure and its tainted fruit. Thus they noted that the defendant admitted the crime, both to the police and to his psychiatrists, that he was found in recent possession of a knife and a ten dollar bill similar to that involved in the incident, and that laboratory analysis of his undergarments corroborated the other evidence of his participation. Appropriately, they concluded that "[a]t the trial the only real issue was the defendant's sanity at the time of the crime or the lack of it." Id.

(h) FEDERAL QUESTION JURISDICTION

The question presented is a federal one both because the harmless error doctrine of Chapman v. California, 386 U.S. 18 (1967) is itself of constitutional dimension and because the substantive context in which it was examined in this case was the fourteenth amendment to the federal constitution. Initially, there is little question that the Supreme Court of Connecticut relied solely on Chapman to create an automatic reversal rule.[1] The court quoted directly from Chapman to the effect that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." Id. at 23. See State v. Gordon, supra, at 47-48. Although the court also cited two state cases in support of its per se rule, those cases do little more than inquire into the applicability of the Chapman harmless constitutional error standard to other substantive rights. State v. Truppi, ___ Conn. ___, 42 Conn. L.J. No. 25, pp. 1, 6 (Dec. 16, 1980), cert. denied, 101 S. Ct. 2024 (1981)(instructions shifting burden of proof); State v. Zeko, 177 Conn. 545, 558, 418 A.2d 917 (1979)(comment on accused's silence). See State v. Gordon, supra at 48. Thus this case is not like Fahy v. Connecticut, 375 U.S. 85, 86 n.2 (1963), in which the Supreme Court of Connecticut had relied on its own statutory harmless error rule. See State v. Fahy, 149 Conn. 577, 588, 183 A.2d 256 (1962), rev'd, 375 U.S. 85 (1963); Conn. Gen. Stat. § 52-265 (1981).

Chapman, of course, held that before a federal constitutional error can be held

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[1]The trial court, of course, had no occasion to address the harmless error issue.

harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. 386 U.S. at 24. Although this Court did not indicate the source of this holding, there is every reason to conclude that it is a Court-devised "prophylactic rule[ ] designed to safeguard other constitutional guarantees...." Brewer v. Williams, 430 U.S. 387, 426 (1977) (Burger, C.J., dissenting), much like the requirements of Mapp v. Ohio, 367 U.S. 643 (1961), and Miranda v. Arizona, 384 U.S. 436 (1966). Subsequent commentary on the case has variously ascribed the harmless constitutional error doctrine to this Court's supervisory powers or to its authority to create federal common law. See Mause, Harmless Constitutional Error: The Implications of Chapman v. California, 53 Minn. L. Rev. 519, 533-35 (1969); Note, Harmless Constitutional Error, 20 Stan. L. Rev. 83, 88 n.40 (1967). That interpretation of the Chapman doctrine is itself a federal question seems settled by Fontaine v. California, 390 U.S. 593, 595-96 (1968), in which this Court reviewed the California Supreme Court's application of Chapman to prejudicial comments on the defendant's silence at trial.

The Chapman decision exposes a second rationale for federal question jurisdiction in this case. Since certiorari in Chapman was granted to consider California's construction of its own harmless error provisions, this Court needed to decide, as it did, that application of a state harmless error rule is a federal question when it involves errors of federal constitutional proportion. 386 U.S. at 20-21. Thus even if this Court should decide that interpretation of Chapman is not itself a federal question, such a question would exist if the substantive rights found violated were federal ones.

The argument that the showup procedures in question transgressed the fourteenth amendment to the federal constitution was consistently argued and squarely addressed in the courts below. On the motion to suppress in the trial court, which was held outside of the jury's presence, the defendant maintained that admission of the identification evidence would be error under such federal cases as Manson v. Braithwaite, 432 U.S. 98 (1977) (See Appendix A). The trial judge denied the motion, citing, inter alia, Neil v. Biggers, 409 U.S. 188 (1972)(See Appendix B).

On appeal the defendant raised both federal and state due process arguments. State v. Gordon, supra, at 45.[2] Nevertheless, the decision of the supreme court relies wholly on the opinions of this Court such as Stovall v. Denno, 388 U.S. 293 (1967), or on state cases that ultimately rest on United States Supreme Court authority. E.g., State v. Hefner, 168 Conn. 230, 235, 362 A.2d 925, cert. denied, 423 U.S. 851 (1975). See State v. Gordon, supra, at 45-47. In fact, the Supreme Court of Connecticut has never construed the state due process clause, see Conn. Const. article I, § 8 (1981), to have any meaning apart from that of its federal counterpart. See Caldor's Inc. v. Bedding Barn, Inc., 177 Conn. 304, 314, 417 A.2d 343 (1979). Under these circumstances, the state and federal grounds are "so interwoven

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[2]The Supreme Court of Connecticut also noted that the defendant's appellate brief cited article first, § 9 of the Connecticut constitution, which provides that "[n]o person shall be arrested, detained or punished, except in cases clearly warranted by law." Other than that reference, however, the court did not discuss this provision.

that [it is impossible] to conclude that the judgment rests upon an independent interpretation of the State law...." Jankovich v. Indiana Toll Road Commission, 379 U.S. 487, 492 (1965). Thus either because decisions interpreting the Chapman rule invariably raise federal questions or because the underlying constitutional rights in this case were federal ones, this Court has jurisdiction to grant certiorari.

(h)(i)-(iv) The appendix to this petition contains a portion of defense counsel's argument on the motion to suppress in superior court, the superior court judge's ruling from the bench denying the defendant's motion to suppress, the judgment of the Superior Court of Connecticut, the opinion of the Supreme Court of Connecticut, and the order of the Supreme Court of Connecticut denying the state's motion to reargue.

(j) REASONS FOR ALLOWANCE OF THE WRIT

(1) CONNECTICUT IS THE ONLY JURISDICTION IN THE NATION TO REQUIRE AUTOMATIC REVERSAL WHEN UNRELIABLE IDENTIFICATION EVIDENCE IS ADMITTED.

In Chapman v. California, 386 U.S. 18, 23 (1967), this Court stated that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." At the same time the Court recognized that some constitutional rights are so basic to a fair trial that their violation can never constitute harmless error. Id. at 23. Although after

Chapman this Court has considered the applicability of its harmless error rule to various constitutional rights, see Holloway v. Arkansas, 435 U.S. 475, 489-91 (1978)(assistance of counsel); Schneble v. Florida, 405 U.S. 427, 432 (1972)(confrontation of witnesses), it has specifically reserved decision on the issue in this case, namely whether the rule can extend to the admission of unreliable identification evidence. Foster v. California, 394 U.S. 440, 444 (1969).

Given the silence of this Court on the subject, one might expect a diversity of opinions in the state and lower federal courts. Such has not been the case. The survey of jurisdictions outlined below reveals Connecticut to be the only one in the nation to require automatic reversal when unreliable identification evidence is admitted.

No less than eight federal circuit courts of appeal have specifically held, citing Chapman or cases that ultimately rely on it, that under the facts there presented the admission of unnecessarily suggestive and unreliable identification evidence was harmless beyond a reasonable doubt. See United States v. Stubblefield, 621 F.2d 980, 983 (9th Cir. 1980); United States v. Milhollan, 599 F.2d 518, 524 (3d Cir.), cert. denied, 444 U.S. 909 (1979); Boyd v. Henderson, 555 F.2d 56, 62 (2d Cir.), cert. denied, 434 U.S. 927 (1977); Montiero v. Picard, 443 F.2d 311, 313-14 (1st Cir. 1971), cert. denied, 404 U.S. 1041 (1972); Marshall v. United States, 436 F.2d 155, 159-61 (D.C. Cir. 1970); United States v. DeBose, 433 F.2d 916, 918 (6th Cir. 1970), cert. denied, 401 U.S. 920 (1971); United States v. Gunn, 428 F.2d 1057, 1061 (5th Cir. 1970); United States v. Satterfield, 410 F.2d 1351, 1354, (7th Cir. 1969), cert. denied, 399 U.S. 934 (1970).

Sixteen state appellate courts have held similarly. See Henderson v. State, 373 So. 2d 1218, 1221 (Ala. Crim. App.), writ denied, 373 So. 2d 1221 (Ala. 1979); Davis v. State, 499 P.2d 1025, 1033-34 (Alas. 1972), rev'd on other grounds, 415 U.S. 308 (1974); State v. Lang, 107 Ariz. 400, 489 P.2d 37, 41-42 (1971); In re Terry, 4 Cal. 3d 911, 484 P.2d 1375, 1386, 95 Cal. Rptr. 31, cert. dismissed, 404 U.S. 980 (1971); Martin v. State, 346 A.2d 158, 159 (Del. 1975); Pender v. United States, 310 A.2d 252, 254 (D.C. 1973); Bryan v. State, 290 So. 2d 515, 516 (Fla. Dist. Ct. App.), cert. denied, 297 U.S. 569 (1974); People v. Scales, 47 Ill. App. 3d 755, 362 N.E. 2d 691, 696 (1977); Langley v. State, 256 Ind. 199, 267 N.E.2d 538, 544 (1971); Booth v. State, 16 Md. App. 524, 298 A.2d 478, 481 (1973); Commonwealth v. Thompson, 362 Mass. 382, 286 N.E.2d 333, 335-36 (1972); Butler v. State, 217 So. 2d 3, 7 (Miss. 1968); State v. Johnson, 485 S.W.2d 106, 115 (Mo. 1972); State v. Van Egmond, 206 Neb. 356, 293 N.W.2d 74, 76 (1980); People v. Cyrus, 76 A.D.2d 842, 843, 428 N.Y.S.2d 325 (1980); Commonwealth v. Hancock, 455 Pa. 583, 317 A.2d 588, 591-92 (1974).

Other jurisdictions have found similar errors harmless, although without citing to Chapman. See State v. Naeole, 617 P.2d 820, 826 (Haw. 1980); State v. Long, 298 Minn. 581, 216 N.W.2d 640, 641 (1974); State v. Unwin, 424 A.2d 251, 255 (Vt. 1980). cert. denied, 101 S. Ct. 1746 (1981). Some, however, have explicitly stated that the error was "harmless beyond a reasonable doubt," thus effectively incorporating the Chapman analysis. See Royal v. Maryland, 529 F.2d 1280, 1281 (4th Cir. 1976); People v. Lyles, 100 Mich. App. 232, 298 N.W.2d 713, 718 (1979); State v. Conyers, 33 N.C. App. 654, 236 S.E.2d 393, appeal dismissed, 293 N.C.

362, 238 S.E.2d 150 (1977); State v. Armstrong, 52 Or. App. 161, 628 P.2d 1206, 1211 (1981). See also Chapman v. California, 386 U.S. 18, 24 (1967). Finally, five appellate courts, while declining to find harmless error in the cases before them, have suggested in dictum that Chapman permits such a finding. See United States v. Thomas, 536 F.2d 1253, 1254 (8th Cir. 1976); Foster v. State, 156 Ga. App. 672, 275 S.E.2d 745, 747 (1980); State v. LeBlanc, 290 A.2d 193, 200-01 (Me. 1972); State v. Edge, 111 N.J. Super. 182, 268 A.2d 35, 38 (App. Div. 1970), rev'd on other grounds, 57 N.J. 580, 274 A.2d 42 (1971).

The typical case resembles the instant one. In Marshall v. United States, 436 F.2d 155, 158-161 (D.C. Cir. 1970), for example, the District of Columbia Circuit found that admission of improperly suggestive lineup evidence was harmless error when a bank robber had been arrested 100 yards from the bank, with gun and marked bills in hand. In the case at bar, the defendant was likewise apprehended in the vicinity of the offense in possession of both the fruit and the instrumentality of the crime. Moreover, at least one court has recognized that erroneously admitted identification evidence is especially harmless when the defense is insanity, as it was here. See State v. Johnson, 485 S.W.2d 106, 115 (Mo. 1972).

Rule 17.1(b) of the United States Supreme Court Rules provides that a critical consideration governing review on certiorari is whether the state court has decided the question presented in a way in conflict with that of other state courts or of the federal courts of appeal. The foregoing discussion reveals the opinion of the Supreme Court of Connecticut to be alone in a sea of contrary decisions. While of course the state supreme court could freely decide the issue on state

grounds, its reliance on Chapman subjects it to the rule that state courts have no authority to go beyond the mandates of the federal constitution. See North Carolina v. Butler, 441 U.S. 369, 376 (1979). For this reason alone this Court should grant certiorari.

(2) THE CONNECTICUT SUPREME COURT'S REQUIREMENT OF AUTOMATIC REVERSAL IN THIS CASE IS IN CONFLICT WITH THIS COURT'S DECISIONS PERMITTING A FINDING OF HARMLESS ERROR WHEN LINEUP EVIDENCE IS INTRODUCED IN VIOLATION OF THE ACCUSED'S RIGHT TO COUNSEL.

Because the showup evidence in this case was concededly "unnecessarily suggestive and conducive to irreparable mistaken identification," Stovall v. Denno, 388 U.S. 293, 302 (1967), its admission violated the due process clause of the fourteenth amendment. Id. at 301-02. A separate constitutional basis for barring the admission of such evidence, although one which played no part in this case, is that the identification procedures were conducted in derogation of the accused's sixth amendment right to counsel, as in United States v. Wade, 388 U.S. 218 (1967). While the Supreme Court of Connecticut, in the absence of any contrary command from this Court, now requires automatic reversal in the former situation, this Court has twice permitted a finding of harmless constitutional error when uncounseled identification procedures were erroneously admitted. Moore v. Illinois, 434 U.S. 220, 232 (1977); Gilbert v. California, 388 U.S. 263, 272-74 (1967).

There is little to justify these opposite conclusions. The purpose of counsel at pretrial identifications is, at least in

part, to minimize their "grave potential for prejudice." United States v. Wade, supra, at 236. Thus when an uncounseled identification procedure is admitted at trial the same possible prejudice to the accused exists as when an overly suggestive and unreliable identification is introduced in violation of the due process clause. Logically, if a Wade error can be harmless, as this Court has held, then a Stovall error, which would cause similar prejudice, can be harmless as well.

The admission of unreliable identification evidence is unlike the commission of other errors that require automatic reversal under past decisions of this Court. The use of racially discriminatory methods in selecting jurors, see Whitus v. Georgia, 385 U.S. 545 (1967), a trial before a biased judge, see Tumey v. Ohio, 273 U.S. 510 (1927), or the conviction under an unconstitutional statute, see Williams v. North Carolina, 317 U.S. 287, 292 (1942), merit a per se harmfulness rule because these errors infect the entire trial. Their impact is indeterminable; their harm, irreparable. The admission of unreliable or uncounseled showup evidence, in contrast, is an error that affects only the prosecution's proof of the accused's identity. It is thus curable by the introduction of some quantum of admissible evidence relevant to that element. Indeed, just last term this Court recognized that the presentation of inadmissible identification evidence to the jury is not so irremediable that Wade-Gilbert hearings must invariably be held outside the jury's presence. Watkins v. Sowders, 449 U.S. 341 (1981).

A second reason, then, for this Court to grant certiorari is that the decision of the Supreme Court of Connecticut conflicts

with opinions of this Court permitting a finding of harmless error in the analogous case of erroneous admission of uncounseled identification evidence. See Rule 17.1(c), Revised Rules of the Supreme Court of the United States.

(3) THE HARMLESS ERROR TEST EMPLOYED BY THE SUPREME COURT OF CONNECTICUT IS IN CONFLICT WITH THAT USED BY THIS COURT.

The Supreme Court of Connecticut suggested in dictum that even if it were to apply harmless constitutional error analysis it would find the error in question to be harmful. State v. Gordon, supra, at 48. Obviously, in order to reverse the judgment of that Court it is necessary to show that, on the contrary, the error was harmless. Making that showing is simplified in this case by the fact that the state supreme court failed to employ the test used by this Court to determine the harmfulness of constitutional error.

In concluding its discussion of how to apply the Chapman standard, the state supreme court quoted Justice Brennan's dissenting opinion in Harrington v. California, 395 U.S. 250 (1969), to the effect that "[t]he focus of the appellate inquiry should be on the character and quality of the tainted evidence as it relates to the untainted evidence." Id. at 256 (Brennan,J., dissenting). That statement in Harrington was made as part of the dissent's criticism of the majority for finding harmless constitutional error when there is "'overwhelming' untainted evidence to support the conviction." Id. By relying on the Harrington dissent on this disputed issue, the state supreme court effectively conceded that it

was applying the test that the Harrington majority had rejected.

Subsequent decisions of this Court confirm that harmless error analysis should center on the magnitude of the untainted evidence rather than on whether the constitutional error contributed to the conviction.[3] In Schneble v. Florida, 405 U.S. 427 (1972), this Court focused on the "overwhelming independent evidence of guilt," id. at 431, to find harmless a violation of the defendant's sixth amendment confrontation rights. Dealing with a similar error in Brown v. United States, 411 U.S. 223 (1973), the Court noted that the improperly admitted evidence "was merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury." Id. at 231.

The state supreme court, to be sure, acknowledged the most recent pronouncement of this Court that harmless constitutional error exists when "the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the [erroneously admitted evidence] so insignificant by comparison...." Parker v. Randolph, 442 U.S. 62, 70-71 (1979). See State v. Gordon, supra, at 48. But by concluding that it "could not say beyond a reasonable doubt that the jury totally ignored or decisively rejected these plainly relevant identifications," id., the

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[3] While conceivably an "overwhelming evidence of guilt" standard could work injustice if the error was, for example, a violation of the accused's right to trial by jury, adequate protection is afforded in such case by the automatic reversal rule. See Duncan v. Louisiana, 391 U.S. 145 (1968).

state supreme court clearly relied on the "contribution to the conviction" standard espoused by the Harrington dissent.

The difference here is crucial. As even the state supreme court majority conceded, the independent evidence of the defendant's participation in the rape and robbery was overwhelming. State v. Gordon, supra, at 48. Arrested soon after and in the vicinity of the crime, the defendant stated, "I don't know why I touched her," and then, "I stole the money from her." On his person was found a knife and a ten dollar bill similar to those involved in the crime. Laboratory analysis revealed seminal stains on the undergarments of the sixteen year old defendant. He admitted both plotting and committing the crime to two of his own psychiatrists. Properly applied, the Chapman test would unquestionably dictate a finding of harmless error in these circumstances. Because the Supreme Court of Connecticut's interpretation of this test was in conflict with that of this Court the petition for a writ certiorari should be granted. See Rule 17.1(c), Revised Rules of the Supreme Court of the United States.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to the Supreme Court of Connecticut or, in the alternative, vacate and reverse the judgment of that court.

Respectfully submitted,

AUSTIN J. McGUIGAN
Chief State's Attorney
P. O. Box 5000
Wallingford, CT 06492
(203) 265-2373
Counsel of Record for
the Petitioner

With whom on the brief:

CARL SCHUMAN
Assistant State's Attorney
Office of the Chief
State's Attorney

NO.

In The
Supreme Court Of The United States

NOVEMBER TERM, 1981

STATE OF CONNECTICUT
Petitioner

vs.

MITCHELL GORDON
Respondent

APPENDIX

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APPENDIX A

Excerpt From Defense Counsel's Argument On Defendant's Motion To Suppress Identification Evidence.

Now, I know that Mr. Gaffney is going to talk about Manson and Brathwaite, which is one of the last pronouncements by the Supreme Court. The Second Circuit held that, "Any form of one-man lineup or one-man identification procedure was so impermissibly suggestive as to make it void." They wouldn't permit any form of it. The second Circuit had held that-- and the case went to the Supreme Court and the Supreme Court in Manson turned around and said that, again, the test is the totality of the circumstances.

In Manson and Brathwaite, the observer that Mr. Gaffney was offering as a witness was a police officer trained in identification procedures. He was a policeman who had investigated numerous narcotic offenses and was familiar with individuals engaged in the trafficing of narcotics, and therefore, again, on an ad hoc basis, the Supreme Court of the United States said that on the totality of the circumstances, it was not impermissibly suggestive for Mr. Gaffney's investigator detective, as I recall, to show that one picture to the police officer. That's not the situation that your Honor is confronted with here. Here your Honor is * * *

(Trial Transcript at 175.)

APPENDIX B

Superior Court Judge's Ruling From The Bench Denying Defendant's Motion To Suppress Identification Evidence.

THE COURT: Basically, what's before the Court is the question relating to the anticipated out-of-court identification by the witness, who is on the stand, at that time that question was asked. Is that correct?

ATTORNEY HEIMAN: That's correct, your Honor.

THE COURT: Go ahead.

ATTORNEY HEIMAN: And the incourt.

THE COURT: And the incourt identification, yes. And the Court heard testimony last week and this week in the absence of the jury with respect to the-- I suppose it's the defense's motion that it would be-- testimony as in the manner in which the identification was made, or would be made, would be so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Is that a fair statement?

ATTORNEY HEIMAN: That's correct, your Honor.

THE COURT: Yes, now, counsel referred the Court to a number of cases, many the Court is familiar with and counsel made certain that the Court saw a particular Supreme Court case in which he was an active participant and I read that case and was led to

examine it again during the brief interval. I reviewed the contentions of counsel as they relate to the law, as I understand it, and it's the Court's conclusion--and it's based upon the totality of the circumstance--and I think both counsel will agree that the Supreme Court examines each, in a sense, as a per se procedure with respect to the facts of this particular case.

The recent Connecticut case which is not in the bound volume but 173 Connecticut 545 reiterates that fact and it refers to the Neal versus Biggers and Simmons versus United States and concludes that each case must be considered on its own facts and that particular case has to do with photographic evidence but it refers to the matter that I referred to about the situation being so impermissibly suggestive as to give rise to the substantial likelihood of irreparable misidentification.

Under the present circumstances, the Court has in mind the totality of the circumstances, the opportunity of the witness at the time, the accuracy of the description and actually the time element that elapsed and in light of all that, if there is an objection to the identification by the defense, the objection is overruled.

ATTORNEY HEIMAN: May I have an exception, your Honor.

THE COURT: An exception may be noted.

(Trial Transcript at 187-89.)

APPENDIX C

Judgment Of The Superior Court Of Connecticut.

STATE OF CONNECTICUT
SUPERIOR COURT, HARTFORD COUNTY
Hon. Paul J. Driscoll, Judge

No. 42040

STATE

VS.

MITCHELL BENJAMIN GORDON March 29, 1979

George D. Stoughton, State's Attorney for the County of Hartford accuses Mitchell Benjamin Gordon of Glastonbury, Connecticut of Sexual Assault in the First Degree at the Town of Glastonbury on or about the 20th day of May, 1977 in violation of Section 53a-70 (a)(2) of the General Statutes, as charged in the first count; and further accuses the said Mitchell Benjamin Gordon of Robbery in the First Degree at the Town of Glastonbury on or about the 20th day of May, 1977 in violation of Section 53a-134(a)(3) of the General Statutes, as charged in the second count, as by information on file will appear.

To the two counts of said information the said Mitchell Benjamin Gordon on July 29, 1977 pleaded and said that he was not guilty and elected to be tried by a jury of six.

Said cause having been fully heard and committed to the jury, they by their verdict on February 16, 1979 found the said Mitchell Benjamin Gordon guilty as charged in the first count and guilty of the lesser

included offense of Robbery in the Third Degree, in violation of Section 53a-136 of the General Statutes, in the second count in said information.

Said action thence came to February 22, 1979 when the defendant filed a motion for judgment of acquittal upon verdict of guilty, thence to the 29th day of March, 1979 when the parties appeared and were fully heard on said motion.

The Court (Driscoll,J.), after hearing the parties found that the said motion should have been and the same was denied.

Whereupon it is adjudged that the said Mitchell Benjamin Gordon be confined at the Connecticut Correctional Institution at Cheshire for an indefinite term not to exceed five (5) years on the first count; for an indefinite term not to exceed five (5) years on the second count; said sentences to run concurrently.

By the Court,

Raymond Cuatto
Assistant Clerk

(Record at 4-5, State v. Gordon, No. 9569 [Conn. 1981]).

APPENDIX D

Opinion Of The Supreme Court Of Connecticut As Reported In 43 Connecticut Law Journal, No. 7, pp. 42-50 (Aug. 18, 1981)

SUPREME COURT

June Term, 1981

STATE OF CONNECTICUT *v.* MITCHELL GORDON

BOGDANSKI, C. J., PETERS, HEALEY, PARSKEY and ARMENTANO, Js.

Argued June 9—decision released August 18, 1981

Information charging the defendant with the crimes of sexual assault in the first degree and robbery in the first degree, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford and tried to the jury before *Driscoll, J.;* verdict and judgment of guilty and appeal by the defendant. *Error; new trial.*

Maxwell Heiman, with whom, on the brief, was *William J. Tracy, Jr.,* for the appellant (defendant).

Carl Schuman, assistant state's attorney, with whom, on the brief, were *Robert Beach, Jr.,* and *Bernard Gaffney,* assistant state's attorneys, for the appellee (state).

BOGDANSKI, C. J. The defendant was accused of the crime of sexual assault in the first degree in violation of § 53a-70 (a) (2)[1] of the General Statutes and of the crime of robbery in the first degree in violation of § 53a-134 (a) (3)[2] of the General Statutes. A jury found him guilty as charged on

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1 Footnotes commence at page 25A.

the first count and guilty on the second count of the lesser included offense of robbery in the third degree in violation of § 53a-136 (a)[4] of the General Statutes. From the judgment rendered thereon, he has appealed.

The defendant contends that the trial court erred: (1) in ruling that sufficient evidence supported the jury's verdict; (2) in permitting the victim to testify to her prior identification of the defendant and to identify him in court; (3) in refusing to instruct the jury on larceny in the fourth degree as a lesser included offense within the second count; and (4) in giving three particular instructions to the jury.

The following evidence is relevant to our treatment of the issues: Around 8 a.m. on the morning of May 20, 1977, in a parking lot near Main Street, Glastonbury, an assailant grabbed the victim from behind and put a knife to her stomach. The victim wore eyeglasses. She tried to break free and caught a quick look at her assailant. At trial she testified that her quick look revealed a five foot four inch tall individual who wore a blue shirt and, over his face, an orange ski mask. While telling her that if she didn't keep quiet he would put a hole in her stomach, he kicked and pushed her towards a shadowy and dark abandoned greenhouse which had no artificial lighting. Along the way, as she struggled to free herself, she asked him if he wanted money or sex or other things. He responded with silence. Subsequently, he removed her glasses and blindfolded her. As she entered the greenhouse cellar she dropped her purse. Despite the blindfold, she managed to see a little bit of what her assailant looked like. At the trial she testified that she had observed that he was a thin white male with brown, wavy hair which extended an inch below his ears, a pointy nose, high cheekbones, broad shoulders, a blue shirt, dungarees and a belt with a heavy buckle. She no longer saw his knife. When he noticed that she could see him, he threatened to hit her unless

she covered her eyes. Thereafter she pressed her hand tightly over the blindfold which covered her eyes. She was afraid to look at him again and was unable to see anything more. At times the assailant was angry and abusive, at other times he was polite. He removed her clothing and carefully folded it. After the sexual assault, she pleaded with him to let her alone. She then heard him start to run toward the cellar hatchway. Although the blindfold had slipped, she looked in the opposite direction as he fled. Before he left the cellar, he shouted something at her and said "your purse is in here if you want it when you're done." He then ran outside. The entire incident took eight to nine minutes, six of which were spent in the greenhouse cellar. Sometime later, the purse was found and she discovered that a ten dollar bill was missing.

Within minutes of the attack, she reported the incident to the police, who arrived almost immediately. They found the distraught victim, next door to the greenhouse, at her doctor's home. She described her assailant as a white male of average height with dark brown, wavy hair, wearing a blue shirt and dungarees. At that time, the police could not get any more details of the assailant's appearance from the victim.

The defendant, a sixteen-year-old white male, was seen within several blocks of the incident shortly after the description was broadcast. Two off-duty firemen, who heard the description broadcast, saw the defendant start to run when a police car went by. They chased him into a back yard where he sat against a fence, took out a notebook, and apparently began to write his homework. He cried continuously and pounded his fist on the ground repeatedly. Lieutenant Paul Gibbons arrived within minutes. When Gibbons told him to stand, the defendant rose and said, "I don't know why I touched her." Gibbons patted him down and felt a hard object in his pants pocket. In response to a request to hand it over,

the defendant handed Gibbons a jackknife and a ten dollar bill and said he had stolen the money from her. Gibbons then formally arrested the defendant and took him to the victim's doctor's driveway.

Within twenty minutes of the attack, Officer James Thomas asked the victim if she would look at someone who had just been located in the area. From a distance of thirty feet, the victim looked at the defendant who was seated in the back seat of an unmarked police car. She declined to make an identification. Because the victim was upset, the police did not insist that she take a closer look at the defendant. At Thomas' suggestion, she agreed to go to the police station to look at the defendant through one-way glass in order to avoid a face-to-face confrontation. On the way to the station house, Thomas discussed the mechanics of the one-way glass with the victim. At the station, the victim told the police that she had only seen a little of her assailant's face and she repeated her earlier description of the assailant, adding only that he was in his early twenties. Thomas then asked her to look into a room and to identify, if she could, the person in the room. Still crying and emotionally upset, within ninety minutes of the crime, she viewed the defendant being interviewed by Gibbons, a much older person. She noted that the defendant had dark brown, wavy hair which extended an inch below his ears, broad shoulders, and a pointy nose, and that except for his younger appearance his facial features generally resembled her assailant. She also noted that the dungarees and blue shirt looked the same and that the defendant wore a belt with an unusual buckle. She spent three or four minutes making the identification and emerged from the room 80 percent certain of its accuracy. She attributed her uncertainty to the limited view she had gotten of her assailant. Subsequently, she saw the defendant twice, each time for about two minutes during court proceedings approximately one month after the incident.

The defendant moved for judgment of acquittal at the close of both the state's case and all the evidence, and also after the jury returned their verdict of guilty. The portions of the motions relevant to this appeal argued (1) that the state failed to prove beyond a reasonable doubt that the defendant was sane at the time of the crime and (2) that the evidence failed to support the jury's conclusion that the defendant committed a robbery.

The defendant asserts that the court erred in denying these motions. "We have repeatedly stated the test which this court employs to determine whether the evidence is sufficient to sustain a verdict: '"[T]he issue is whether the jury could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify the verdict of guilty beyond a reasonable doubt . . . ."' *State* v. *Gaynor,* Conn. (42 Conn. L.J., No. 25, p. 25) (1980), quoting *State* v. *Festo,* Conn. (41 Conn. L.J., No. 52, pp. 7, 9) (1980); *State* v. *Nemeth,* Conn. (42 Conn. L.J., No. 23, pp. 3, 5) (1980); *State* v. *Saracino,* 178 Conn. 416, 419, 423 A.2d 102 (1979); *State* v. *Jackson,* 176 Conn. 257, 262, 407 A.2d 948 (1978). "In ruling on such a motion, the evidence presented at the trial must be given a construction most favorable to sustaining the jury's verdict." *State* v. *Jackson,* supra, 262; see *State* v. *Nemeth,* supra; *State* v. *Chetcuti,* 173 Conn. 165, 172, 377 A.2d 263 (1977). "Each essential element of the crime charged must be established by proof beyond a reasonable doubt, '"and although it is within the province of the jury to draw reasonable, logical inferences from the facts proven, they may not resort to speculation and conjecture."' *State* v. *Gaynor,* supra, 25; *State* v. *Festo,* supra, 9." *State* v. *Stankowski,* Conn. (42 Conn. L.J., No. 46, pp. 5, 7) (1981); see *State* v. *Smith,* Conn. (43 Conn. L.J., No. 4, pp. 1, 4) (1981).

The defendant called several lay witnesses who testified to their observation of the defendant prior to and immediately after the incident. Both the defendant and the state called expert witnesses who based their testimony on their examinations, examinations by others and tests performed both before and after the incident. All the expert witnesses agreed that the defendant suffered from a mental disease or defect. Witnesses called by the defendant testified that the defendant lacked a substantial capacity to conform his conduct to the requirements of the law. On cross-examination, Dr. John Haksteen, one of the experts called by the defendant, admitted that he had read a report of psychological tests given to the defendant before the assault and that these tests had indicated that the defendant was a bright, normal sixteen-year-old who had an unhappy home life, but that the report had not recommended psychiatric treatment. Haksteen also admitted that the American Psychiatric Association had not recognized the type of disorder which he asserted caused the defendant to lack a substantial capacity to conform to the requirements of the law. Haksteen also conceded that the defendant had planned the rape for several days and studied the pattern of the victim's daily activities during that time. The expert witness called by the state concluded that although the defendant did not have complete control of himself, he did not lack a substantial capacity to conform his conduct to the requirements of the law.

The weight to be given both the opinion evidence of expert witnesses and the lay evidence of sanity is for the jury to determine. *State* v. *Smith*, Conn. (43 Conn. L.J., No. 4, pp. 1, 5) (1981); *State* v. *Ontra*, 178 Conn. 480, 484, 423 A.2d 134 (1979). The evidence enabled the jury to conclude beyond a reasonable doubt that the defendant was sane at the time the crimes were committed.

B

The defendant contends that no evidence connected the use of force or threats to use force with the taking of the money and that therefore we must reverse his conviction for robbery. "Without the purpose of '(1) [p]reventing or overcoming resistance to the taking of the property or the retention thereof immediately after the taking; or (2) compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny'; General Statutes § 53a-133; there can be no robbery . . . ." *State* v. *Coston,* Conn. (42 Conn. L.J., No. 24, pp. 1, 3) (1980). To commit a robbery, under our statute, an offender must have such a purpose at the time, during the course of committing a larceny, when he uses or threatens the immediate use of physical force upon another person. An offender, however, may commit robbery although he does not use or threaten to use force at the precise time he takes the property if he uses or threatens to use physical force at some other time during the course of committing the larceny. An act may have more than one purpose and more than one effect. Thus a jury reasonably may find that acts which compelled a victim to engage in sexual intercourse also had the purpose of preventing the victim's resistance to the taking of her property.

The use of force and threats of physical force left the victim alone with the defendant in an abandoned cellar, partly naked, and thoroughly shaken. The defendant had told her that if she screamed, he would cut a hole in her stomach. He had subjected her to a fully consummated sexual assault. The intimidation surely contributed to the lack of resistance to the larceny. The evidence allowed the jury to conclude that the defendant intended his use and threats of force to prevent the victim from resisting the taking of her property. A use of force

for such a purpose occurs in the course of committing a larceny if it induces in the victim a physical disability or a reasonable emotional response that causes her not to resist the taking of her property. A more substantial interval than the seconds or minutes that may have elapsed here between the time of the intimidation and of the taking would not preclude a jury from finding that the use or threat of force occurred in the course of a larceny. *Tipton* v. *State*, 23 Okla. Crim. 86, 96, 212 P. 612 (1923); 2 Wharton, Criminal Law & Procedure § 559; 77 C.J.S., Robbery § 16. Sufficient evidence supported the jury's verdict on the robbery count.

II

The defendant contends that the denial of his motion to strike the testimony of the prior out-of-court identification of the defendant and the denial of his motion to prevent any in-court identification of the defendant by the victim constitutes a deprivation of due process of law in violation of article first, §§ 8 and 9 of the constitution of Connecticut and the fourteenth amendment to the constitution of the United States.[5]

The "use of out-of-court police identification procedures may give rise to a claimed violation of due process of law if the conduct of the procedure in a given instance was 'unnecessarily suggestive and conducive to irreparable mistaken identification,' a claim whose adjudication, however, 'depends on the totality of the circumstances surrounding it.' *Stovall* v. *Denno*, 388 U.S. 293, 302, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 [1967]." *State* v. *Hafner*, 168 Conn. 230, 235, 362 A.2d 925, cert. denied, 423 U.S. 851, 96 S. Ct. 95, 46 L. Ed. 2d 74 (1975); see *State* v. *Packard*, Conn. (42 Conn. L.J., No. 48, pp. 5, 6) (1981); *State* v. *Johnson, Jr.*, Conn. (42 Conn. L.J., No. 35, pp. 4, 5) (1981); *State* v. *Anderson*, 178 Conn. 287, 291, 422 A.2d 323 (1979); *State* v. *Willin*, 177 Conn. 248, 251, 413 A.2d 829 (1979); *State* v.

Harden, 175 Conn. 315, 319 n.2, 398 A.2d 1169 (1978); *State* v. *Kinsey*, 173 Conn. 344, 346-47, 377 A.2d 1095 (1977).

"In determining whether indentification procedures violate a defendant's due process rights, the required inquiry is made on an ad hoc basis and is two-pronged: first, it must be determined whether the identification procedure was unnecessarily suggestive; and second, if it is found to have been so, it must be determined whether the identification was nevertheless reliable based on examination of the 'totality of the circumstances.' See *State* v. *Gold*, Conn. (41 Conn. L.J., No. 47, pp. 1A, 12A-13A), cert. denied, U.S. , 101 S. Ct. 320, 66 L. Ed. 2d 148 (1980); *State* v. *Piskorski*, 177 Conn. 677, 741, 419 A.2d 866 (1979); *State* v. *Willin*, 177 Conn. 248, 251, 413 A.2d 829 (1979); *State* v. *Smith*, 165 Conn. 680, 684, 345 A.2d 41 (1974); see also *Manson* v. *Braithwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977); *Neil* v. *Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972)." *State* v. *Theriault*, Conn. (42 Conn. L.J., No. 22, pp. 8, 10) (1980); see *State* v. *Packard*, supra; *State* v. *Anderson*, supra, 292; *State* v. *Willin*, supra, 252; *State* v. *Kinsey*, supra, 347.

Applying the *Theriault* test, we must determine first whether the identification procedure used by the police at the station house show-up was unnecessarily suggestive. "Although one man confrontations do not per se constitute a denial of due process; *Neil* v. *Biggers*, supra; *Simmons* v. *United States*, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968); *Stovall* v. *Denno*, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967); *State* v. *Middleton*, 170 Conn. 601, 606, 368 A.2d 66 (1976); *State* v. *Carnegie*, 158 Conn. 264, 269, 259 A.2d 628, cert. denied, 396 U.S. 992, 90 S. Ct. 488, 24 L. Ed. 2d 455 (1969); this court has stated that '[w]ithout question, almost any one-to-one confrontation between

a victim of crime and a person whom the police present to him as a suspect must convey the message that the police have reason to believe him guilty . . . .' *State* v. *Middleton*, supra, 608, quoting with approval *United States ex rel. Kirby* v. *Sturges*, 510 F.2d 397, 403 (7th Cir. 1975); see *State* v. *Willin*, supra, 251." *State* v. *Theriault*, supra. The circumstances of the station house show-up unnecessarily suggested to the victim that she should positively identify the defendant. The witness was told that the police had taken someone into custody near the crime scene. She was asked to look at him immediately. When she declined to identify him she was told she could avoid a face-to-face confrontation by viewing him through one-way glass. The defendant was the only one in the room who came close to fitting the very general description given by the witness. The procedure used by the police, in effect, indicated to the witness that they had seized her assailant and wanted her to confirm their conclusion.

Moreover, the circumstances surrounding the identification do not reveal a need for a one man show-up with its attendant suggestiveness. Although a suggestive procedure may be permitted if exigent circumstances compel its use; *Simmons* v. *United States*, supra, 384–85; this case presented no danger that the opportunity for an identification would be lost unless a speedy show-up was held. See *Stovall* v. *Denno*, supra. The police did not need to determine quickly whether they were on the wrong trail. See *Simmons* v. *United States*, supra. The defendant was safely in custody and had already made incriminating statements. The victim was readily available. The arresting officer testified that, at the time he found the defendant, he had no doubt that he had found the assailant. The show-up took place within one and one-half hours of the incident, but did not take place at the scene of the crime or at the earliest opportunity. The state makes no claim that a lineup was impractical. We

conclude therefore that the show-up in this case was unnecessarily suggestive. *State* v. *Theriault*, supra.

Our determination that the pretrial show-up was unnecessarily suggestive does not end our inquiry into whether the victim's identification of the defendant at the show-up was admissible at trial. The second prong of the *Theriault* test is reliability. Because reliability is the "linchpin" in determining the admissibility of identification evidence; *State* v. *Piskorski*, supra, 742; we must consider whether the "totality of circumstances" render the identification unreliable. *State* v. *Packard*, supra, 7; *State* v. *Theriault*, supra, 11. The factors which determine the reliability of an identification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of her prior description of the criminal, the level of certainty demonstrated at the confrontation and the time between the crime and the confrontation. " 'Against these factors is to be weighed the corrupting effect of the suggestive identification itself.' *Manson* v. *Braithwaite*, supra, 114 (citing *Neil* v. *Biggers*, supra, 199–200)." *State* v. *Piskorski*, supra; see *State* v. *Packard*, supra; *State* v. *Johnson, Jr.*, supra; *State* v. *Theriault*, supra; *State* v. *Anderson*, supra; *State* v. *Willin*, supra, 252–53.

A suggestive identification procedure may cause a witness to believe sincerely that she retains, from an earlier encounter, memories of descriptive details that she actually fixed in her mind at the identification procedure. Therefore, in determining whether, despite an unnecessarily suggestive procedure, an identification is reliable, the trial court's observation of witnesses carries less weight than in other fact finding contexts. Accordingly, we examine the legal question of reliability with exceptionally close scrutiny and defer less than we normally do to the related fact finding of the trial court.

We test the reliability of the out-of-court identification by the requisite factors. Opportunity to view: The witness had more than one opportunity to view her assailant, but never saw more than a glimpse of him. In the parking lot, where lighting conditions were excellent, she managed to turn once and look at him. He wore a knit ski mask over his face, however, and she saw only the mask, his shirt, and his height. Subsequently her eyeglasses were removed and she was blindfolded. After that, she managed only brief glimpses of her assailant from under the blindfold, all under shadowy and dark conditions. The witness' opportunity to view her assailant was extremely limited because of the ski mask, blindfold, poor lighting conditions, and the removal of her eyeglasses. Degree of attention: The witness' degree of attention was limited because she quickly became emotionally upset and fearful during the assault. She was afraid to look at her assailant. Although the witness was physically close to her assailant throughout the incident, her degree of attention to an identification was limited. In fact, she took deliberate steps to avoid a view of her assailant. Accuracy of prior description: The witness gave a very general description of her assailant to the police. She described her assailant as a white male of average height with dark brown, wavy hair, wearing blue jeans and a blue shirt. When questioned by the police at the scene of the crime, she was not able to give a more detailed description. At the police station prior to the identification, she described her assailant as a man in his early twenties, wearing a blue shirt. She told the police that she only saw a little of her assailant's face. She did not expand upon her description until after the identification at the station house. Immediately after the identification she remarked that the defendant looked younger than her assailant. Only after studying the defendant's appearance at the show-up did she relate that the assailant was thin and had a pointy nose, high cheekbones, broad

shoulders and a belt with a heavy buckle. Furthermore, only then did she specify that the assailant was five feet four inches tall, a height we judicially notice is well below the average stature for American males of the relevant age group.[6] Witness' level of certainty: The witness indicated she was 80 percent certain. Time between the crime and the confrontation: The identification procedure occurred within an hour and a half of the crime. The totality of these circumstances does not support the reliability of the victim's station house identification of the defendant as her assailant. The corrupting effect of the suggestive identification procedure outweighed the few factors that favor finding the station house identification reliable. Therefore the admission of this out-of-court identification violated the defendant's constitutional rights to due process.

In addition to testing the in-court identification by the same indicia of reliability as the station house identification, we must determine whether the state met its burden of establishing by clear and convincing evidence; *State* v. *Harden*, supra, 319 n.2; that the victim based her in-court identification "upon disassociated observation independent of the defective pretrial procedure." *State* v. *Piskorski*, supra, 745; see *State* v. *Gold*, supra, 12A-13A. Some of the circumstances of the in-court identification differ from the station house identification. The in-court identification occurred more than twenty months after the attack, however, in court the victim was totally certain that the defendant was her assailant. We must also consider the corrupting effect of the suggestiveness inherent in the in-court identification procedure used. The procedure consisted of the following exchange between the prosecutor and the victim: "Q. Do you recognize the defendant sitting at the counsel table? A. Yes, I do. Q. And who is he? A. He is the person who assaulted me on May 20, 1977." A prosecutor who directs a witness' attention to one individual and identifies that individual as the defendant and then asks

"Who is he?" suggests how the witness should respond. The victim's testimony that her in-court testimony was not based upon the unnecessarily suggestive show-up or upon her two other confrontations with the defendant at pretrial proceedings is one additional relevant factor, but, in the light of all the other circumstances, it fails to satisfy the state's burden under *State* v. *Harden*, supra. We conclude, on the basis of our review of the totality of the circumstances, that the trial court erred in admitting the in-court identification.

The state urges that even if the trial court erred in admitting both the station house and the in-court identifications of the defendant by the victim, such error would be harmless because of other overwhelming evidence that the defendant was the assailant. "Ordinarily the burden of establishing that harm resulted from a trial court error rests on the appellant. *State* v. *Cooper*, Conn. (42 Conn. L.J., No. 8, pp. 32, 34) (1980); *State* v. *Ruth*, Conn. (41 Conn. L.J., No. 50, pp. 14, 17) (1980); *State* v. *Pepe*, 176 Conn. 75, 81, 405 A.2d 51 (1978). However, 'there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.' *Chapman* v. *California*, 386 U.S. 18, 23, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). If error touches a less basic constitutional right, we sometimes apply the 'harmless error' exception, but only sparingly, in a few, discrete circumstances. *State* v. *Zeko*, 177 Conn. 545, 558, 418 A.2d 917 (1979)." *State* v. *Truppi*, Conn. (42 Conn. L.J., No. 25, pp. 1, 6) (1980), cert. denied, U.S. (49 U.S.L.W. 3807 [April 27, 1981]).

Thus we refuse to expand our harmless constitutional error doctrine to the discrete circumstances of unnecessarily suggestive and unreliable identifications, the admission of which significantly impairs the truth finding function of the jury. See *State* v. *Truppi*, supra, 7. Were we to do so we would fail to

correct negligent infractions of constitutional rights and tempt some public officials to overstep the law in their zeal to convict the guilty. Some would yield to such temptation. The devastating nature of both negligently and deliberately obtained, unreliable eyewitness identifications would inevitably lead to the conviction of innocent persons. Hence sound judicial policy requires reversal whenever the erroneous admission of an unnecessarily suggestive and unreliable identification has violated a defendant's constitutional rights. We reverse the defendant's conviction.

Even if we were to expand our harmless error rule we would not find the error before us to have been harmless. The evidence of the defendant's guilt is indeed overwhelming. Unchallenged overwhelming evidence of the defendant's guilt by itself, however, does not allow this court to hold that the unconstitutional erroneous admission of unreliable evidence is harmless. We could find this error harmless only if both the properly admitted evidence of guilt were so overwhelming and the prejudicial effect of the improper evidence were so insignificant by comparison, that it was clear beyond a reasonable doubt that the improperly admitted evidence did not influence the jury. *Chapman*, supra, 23–24. See *United States* v. *Henry*, 447 U.S. 264, 269 n.5, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980); *Parker* v. *Randolph*, 442 U.S. 62, 70–71, 99 S. Ct. 2132, 60 L. Ed. 2d 713 (1979) (4 judge plurality opinion of Rehnquist, J.). The dissent errs by attempting to measure the effect of the untainted evidence on the jury's decision. Instead "[t]he focus of appellate inquiry should be on the character and quality of the tainted evidence as it relates to the untainted evidence." *Harrington* v. *California*, 395 U.S. 250, 256, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969) (Brennan, J. dissenting).

In the present case the tainted evidence includes all the identifications of the defendant by the only eyewitness to the crime, the victim. Such identifications were of a uniquely damaging character. The victim insisted that she was totally certain that the defendant was her assailant. Under these circumstances we could not say beyond a reasonable doubt that the jury totally ignored or decisively rejected these plainly relevant identifications. The trial court's error, therefore, may have influenced the jury adversely to the defendant. Therefore, we could not say that the error was harmless; *Chapman,* supra; and we would reverse the convictions even without adopting a per se rule.

Because other sufficient evidence supported the defendant's convictions, a new trial on the charges for which he was convicted and their included offenses will not constitute double jeopardy. *State* v. *Smith,* Conn. (43 Conn. L.J., No. 4, pp. 1, 6) (1981). We consider one of the defendant's remaining claims of error because it may arise upon a retrial.

III

The court erred when it refused the defendant's request to instruct the jury that if they did not find the defendant guilty of some degree of robbery, they could consider finding him guilty of the lesser included offense of larceny in the fourth degree.

A defendant is entitled to an instruction on an included offense if, and only if, the following conditions are met: (1) an appropriate instruction is requested by either the state or the defendant; (2) it is not possible to commit the inclusive offense, in the manner described in the information or bill of particulars, without having first committed the included; (3) the evidence, introduced by either the

state or the defendant, or by a combination of their proofs, justifies a conviction for the included offense[8]; and (4) the proof on the element or elements which differentiate the included offense from the offense charged is sufficiently in dispute to permit the jury consistently to find the defendant not guilty of the inclusive offense but guilty of the included. *State* v. *Smith*, Conn. (43 Conn. L.J., No. 4, pp. 1, 5-6) (1981).[9]

The unresolved question posed by this claim of error asks whether the evidence of the defendant's use or threatened immediate use of physical force upon the victim occurred in the course of committing a larceny and for the purpose of preventing her resistance to the taking of her property or compelling her to engage in other conduct which aided in the commission of the larceny. "We must answer in the affirmative if viewing the evidence in the light most favorable to the defendant; *People* v. *Shuman*, 37 N.Y.2d 302, 304, 333 N.E.2d 363 (1975); reasonable minds could differ upon the existence or nonexistence of the element that distinguishes the inclusive from the included offense. *State* v. *Morin*, Conn. (41 Conn. L.J., No. 47, pp. 5, 9) (1980) (*Healey, J.*, dissenting). Otherwise the defendant would lose the right to have the jury pass upon every factual issue fairly presented by the evidence. *Stevenson* v. *United States*, 162 U.S. 313, 314, 16 S. Ct. 839, 40 L. Ed. 980 (1896)." *State* v. *Smith*, supra, 6.

On the basis of the evidence presented, a reasonable juror could have believed that the defendant formed a larcenous intent only after he ceased to use or threaten to use physical force or that the defendant used and threatened the immediate use of force exclusively for purposes other than those stated in the robbery statute. See *People* v. *Pack*, 34 Ill. App. 3d 894, 899, 341 N.E.2d 4 (1976).

There is error, the judgment is set aside and a new trial is ordered.

In this opinion PETERS and PARSKEY, Js., concurred.

ARMENTANO, J. (dissenting in part; concurring in part). I agree that the trial court's ruling to admit into evidence the victim's out-of-court and in-court identifications of the defendant was improper. The analysis, however, does not end there. If we are "'able to declare a belief that [the trial court's error] was harmless beyond a reasonable doubt,' *Chapman* v. *California*, 386 U.S. 18, 24 [,87 S. Ct. 824, 17 L. Ed. 2d 705, reh. denied, 386 U.S. 987, 87 S. Ct. 1283, 18 L. Ed. 2d 241 (1967)]," then a remand is not required and the defendant's conviction of sexual assault in the first degree may be upheld. *Gilbert* v. *California*, 388 U.S. 263, 268, 274, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 (1967); *State* v. *Packard*, Conn. (42 Conn. L.J., No. 48, pp. 5, 8 n.5) (1981); *State* v. *Sorbo*, 174 Conn. 253, 257, 386 A.2d 221 (1978); *State* v. *Oliver*, 161 Conn. 348, 357, 288 A.2d 81 (1971); see *Fahy* v. *Connecticut*, 375 U.S. 85, 86–87, 92–95, 84 S. Ct. 229, 11 L. Ed. 2d 171 (1963) (Harlan, J., with whom Clark, Stewart, and White, Js., joined, dissenting). See also *State* v. *Briggs*, 179 Conn. 328, 337, 426 A.2d 298 (1979), cert. denied, 447 U.S. 912, 100 S. Ct. 3000, 64 L. Ed. 2d 862 (1980). I am able to declare such a belief.

An examination of the transcript of the proceedings below discloses overwhelming evidence of the defendant's guilt. The victim was sexually assaulted during her menstrual cycle by an assailant armed with a knife. Later, she discovered that a ten dollar bill was missing from her purse. The defendant was observed within a few blocks of the scene of the crime shortly after the assault. He matched the general description given by the victim and fled when he observed a police cruiser. When confronted by Lieutenant Gibbons of the Glastonbury police department, the defendant was crying and pounding the ground and said: "I don't know why I touched her." As he handed a pocket knife and a ten dollar

bill to Gibbons, he said: "I stole the money from her." The victim testified that the knife was similar to the one used by her assailant. Laboratory reports disclosed blood and seminal stains on the undergarments worn by the victim and the defendant. An examination of the victim's vaginal area revealed the presence of spermatocytes. In addition to these facts, which alone convince me that the trial court's error was harmless beyond a reasonable doubt, there is the testimony of the defendant's own witnesses.

At the trial the only real issue was the defendant's sanity at the time of the crime or the lack of it. See General Statutes 53a-13. To support this defense, the defendant offered the testimony of a psychiatrist and of a psychologist. During the questioning of them at trial, both doctors testified that the defendant not only admitted to the assault and robbery, but also, that he had begun planning them three days prior to the actual commission of the crimes. This evidence was elicited from the defendant's own witnesses and not from court appointed doctors called by the state. Furthermore the record reveals that some of the incriminating testimony was made during direct and redirect examination of the witnesses and that the defendant's attorney did not object to similar testimony when elicited by the state on cross and recross examination. Finally, there was neither an instruction nor a request for an instruction that the jury consider the testimony given by the doctors only when deciding the question of the defendant's sanity at the time of the crime. For these reasons, the defendant's admissions, as related by his expert witnesses, were pertinent to the issue of the defendant's guilt as well as to his insanity defense. See Practice Book § 760 (formerly Practice Book, 1963, § 2171); see 18 U.S.C. Rule 12.2(c); 18 U.S.C. § 4244; *United States* v. *Cassidy*, 571 F.2d 534, 537 (10th Cir. 1978), cert. denied, 436 U.S. 951, 98 S. Ct. 2859, 56 L. Ed. 2d 793, reh. denied, 439 U.S. 884, 99 S. Ct. 229, 58 L. Ed. 2d 199 (1978); see also *United States* v. *Leonard*, 609 F.2d 1163, reh. denied, 617

F.2d 295 (5th Cir. 1980); *United States* v. *Bennett*, 460 F.2d 872, 878–81 (D.C. Cir. 1972).

The testimony pertaining to the identifications by the victim of the defendant is cumulative at best. Its improper admittance into evidence was harmless error beyond a reasonable doubt. Under the circumstances of this case, a new trial for the crime of sexual assault in the first degree is unwarranted.

I concur with the majority's resolution of the other issues raised in the appeal.

In this opinion HEALEY, J., concurred.

FOOTNOTES

1 At the relevant times General Statutes §53a-70 provided: "SEXUAL ASSAULT IN THE FIRST DEGREE: CLASS B FELONY. (a) A person is guilty of sexual assault in the first degree when such person compels another person to engage in sexual intercourse by the use of force against such other person or a third person, or (2) by the threat of use of force against such other person or against a third person which reasonably causes such person to fear physical injury to such person or a third person."

2 At the relevant times General Statutes §53a-134 provided: "ROBBERY IN THE FIRST DEGREE: CLASS B FELONY. (a) A person is guilty of robbery in the first degree when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime... (3) uses or threatens the use of a dangerous instrument."

3 "[General Statutes] Sec. 53a-136. ROBBERY IN THE THIRD DEGREE: CLASS D FELONY. (a) A person is guilty of robbery in the third degree when he commits robbery."

4 "[General Statutes] Sec. 53a-133. ROBBERY DEFINED. A person commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of: (1) Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or (2) compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny."

The Model Penal Code and Commentaries §222.1, comment, p. 101 n. 13 (1980), observes that unlike most of the states' statutes the use of the word "purpose" in our statute introduces a second specific intent element.

"[General Statutes] Sec. 53a-119. LARCENY DEFINED. A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner."

5 "No person shall...be deprived of life, liberty or property without due process of law...." Conn. Const., art. I §8.

"No person shall be arrested, detained or punished, except in cases clearly warranted by law." Conn. Const., art. I §9.

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law...." U.S. Const., amend XIV §1.

"In the area of fundamental civil liberties - which includes all protections of the declaration of rights contained in article first of the Connecticut Constitution - we sit as a court of last resort, subject only to the qualification that our interpretations may not restrict the guarantees accorded the national citizenry under the federal charter. In such constitutional adjudication, our first referent is Connecticut law and the full panoply of rights Connecticut residents have come to expect as their due. Accordingly, decisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but they are to be followed by Connecticut courts only when they provide no less individual protection than is guaranteed by Connecticut law." *Horton v. Meskill*, 172 Conn. 615, 641-42, 376 A.2d 359. (1977).

6 See Vital and Health Statistics: Series 11; Data from the National Health Survey; Number 165, p. 44 (1977) (based on examination conducted between 1971 and 1974). See also Vital and Health Statistics: Series 11; Data from the National Health Survey; Number 211, p. 11 (1979) (based on examinations conducted between 1971 and 1974).

7 Because other sufficient evidence supported the defendant's convictions, we need not decide whether the double jeopardy clause prohibits a retrial if the exclusion of evidence improperly admitted at trial would make insufficient what had been sufficient evidence to support a verdict. Compare *Matter of M.L.H.*, 399 A.2d 556, 558-59 (D.C. 1979); *State v. Bannister*, 60 Hawaii 658, 660-61, 594 P.2d 133 (1979); *State v. Alexander*, Minn. , 281 N.W.2d 349 (1979); *Sloan v. State*, 584 S.W.2d 461 (Tenn. Crim. App. 1979) (no retrial allowed), with *United States v. Mandel*, 591 F.2d 1347, 1373-74 (4th Cir. 1979), cert. denied, 445 U.S. 961, 100 S. Ct. 1647, 64 L. Ed. 2d

236 (1980); *State v. Boone*, 284 Md. 1, 393 A.2d 1361 (1978); *State v. Wood*, Mo. , 596 S.W.2d 394 (1980); *State v. Verdine*, 290 Or. 553, 624 P.2d 580 (1981); *State v. Lamorie*, 610 P.2d 342 (Utah 1980) (retrial allowed). *Greene v. Massey*, 437 U.S. 19, 26 n.9, 98 S. Ct. 2151, 57 L. Ed. 2d 15 (1978), specifically left this question open.

8 We disapprove of *State v. Tinsley*, Conn. (42 Conn. L.J., No. 1, pp. 4A, 7A) (1980), cert. denied, U.S. (49 U.S.L.W. 3493 [January 13, 1981]), insofar as it did not acknowledge that if the evidence supported a conviction for robbery it necessarily supported a conviction for larceny in the fourth degree.

9 The test is stated more precisely above than it was in *State v. Smith*, Conn. (43 Conn. L.J. No. 4, pp. 1, 5-6) (1981).

APPENDIX E

Order Of The Supreme Court Of Connecticut Denying The State's Motion To Reargue.

NO. 9569

STATE OF CONNECTICUT : SUPREME COURT

VS. : STATE OF CONNECTICUT

MITCHELL GORDON : SEPTEMBER 16, 1981

O R D E R

THE STATE'S MOTION TO REARGUE HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY

ORDERED DENIED.

BY THE COURT

Donald H. Dowling
CHIEF CLERK

Notice
John M. Bailey, State's Attorney
Carl Schuman, Assistant State's Attorney
Ernest J. Diette, Jr., Assistant State's Attorney
Furey, Donovan & Heiman
Clerk, Superior Court, Hartford
September 17, 1981

Opposition

Office - Supreme Court, U.S.
FILED
DEC 19 1981
ALEXANDER L. STEVAS,
CLERK

81-926

No.

In The Supreme Court Of The United States

DECEMBER TERM, 1981

STATE OF CONNECTICUT
Petitioner

vs.

MITCHELL GORDON
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

RESPONDENT'S BRIEF IN OPPOSITION

MAXWELL HEIMAN
43 Bellevue Avenue
P. O. Box 1557
Bristol, CT 06010
(203) 589-4343
Counsel of Record
for Respondent

Of Counsel:

WILLIAM J. TRACY, JR.
Furey, Donovan & Heiman, P.C.

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Statement of the Case

The Defendant, Mitchell Gordon, was charged with one count of sexual assault in violation of Connecticut General Statutes, Section 53a-70(a) 2, and with one count of robbery in violation of Connecticut General Statutes, Section 53a-134(a) 3. To those charges, the Defendant entered a plea of not guilty and elected to be tried by a jury.

The jury returned a verdict of guilty as charged in the first count and not guilty as charged in the second count but guilty of a lesser included offense of robbery in violation of Connecticut General Statutes, Section 53a-136, which verdict was accepted and recorded. The Defendant was adjudged to be committed to custody for incarceration for a term not to exceed five years.

The Defendant appealed to the Supreme Court of the State of Connecticut. The decision of the Supreme Court of Connecticut was reported in 43 Connecticut Law Journal No. 7 p. 42 (August 18, 1981). In that decision, the Supreme Court of Connecticut held that the trial court erred in two respects: (1) it erred by admitting unreliable and illegally obtained identification evidence, (2) it further erred by failing to properly instruct

the jury on a lesser included offense of larceny.

The State of Connecticut seeks a writ of certiorari to the Supreme Court of Connecticut in order to have reviewed the harmfulness of the error in admitting the identification evidence.

Reasons for Denial of Certiorari

(1) THE REVIEW SOUGHT BY THE PETITIONER WOULD NOT ALTER THE DECISION OF THE SUPREME COURT OF CONNECTICUT SETTING ASIDE THE JUDGMENT AND ORDERING A NEW TRIAL.

The order of the Supreme Court of Connecticut setting aside the judgment of conviction and setting a new trial rests on a finding that the trial court committed two separate errors. The error in admitting the identification evidence is related to the jury's verdict on both counts while the error in the instruction to the jury is related only to the verdict in the second count. The petitioner seeks to have only one of those errors declared harmless. Therefore, without regard to the success of the petitioner's arguments, a new trial will be required in this matter.

The exercise in which the petitioner asks this Court to indulge

will prove largely academic. The central question in a determination of harmless error is the effect of the error on the result of the trial. Chapman v. California, 386 U.S. 18, 22-23 (1967), Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963), Harrington v. California, 395 U.S. 250, 253 (1969). The two charges against the Defendant arose out of a series of events involving a single victim and a single assailant. The petitioner argued at trial that the two charges were related and arose out of a single course of conduct by that assailant. The presence or lack of a reliable identification of the assailant is relevant to both charges. Because of the petitioner's claim at trial that the robbery and assault were inter-related, much of the same evidence will have to come before a new jury.

In determining the harmfulness of error, an appellate court is required to hypothesize the nexus between the tainted evidence and the subsequent conviction and to determine the likely impact of the tainted evidence upon the jury. Chapman v. California, supra, Fahy v. Connecticut, supra, Harrington v. California, supra. Such determinations can be more accurately made by the jury itself. By determining the error harmless, an appellate court seeks only to avoid a lengthy and expensive jury trial because of a relatively insignificant

issue. Chapman v. California, supra at 22, Mause, Harmless Constitutional Error: The Implications of Chapman v. California, 53 Minn L. Rev. 519 (1969), Note, Harmless Constitutional Error, 20 Stan. L. Rev. 83 (1967). In this matter, a determination of harmless error will result in no judicial economy. Indeed, far greater economy will result from committing the entire matter to the new jury and the possibility of irreconcilable verdicts will be eliminated. It will be difficult, if not impossible, to explain that the taint of the identification evidence was harmless with regard to one charge should a new jury find the state unable to meet its burden of identification with respect to the second charge in what the state claims to be a single transaction.

(2) THE DECISION OF THE SUPREME COURT OF CONNECTICUT THAT THE ADMISSION OF UNRELIABLE IDENTIFICATION EVIDENCE COULD NOT CONSTITUTE HARMLESS ERROR WAS PROPER.

The vagaries of eyewitness identification and the dangers of miscarriage of justice resulting from mistaken identification are well known to this Court. See, United States v. Wade, 388 U.S. 218 (1967), Gilbert v. California, 388 U.S. 263 (1967), Stovall v. Denno, 388 U.S. 293 (1967).

The impact of an eyewitness identification is substantial; it increases when that identification is made by the victim.

The Supreme Court of Connecticut found that the admission of the identification evidence significantly impaired the truth finding function of the jury. State v. Gordon, supra at 48. The identifications resulted from unnecessarily suggestive procedures. Id. at 46-48. An analysis of the totality of circumstances surrounding the identification revealed that the identifications were unreliable. Id. at 47-48.

The petitioner's analogy to violations of an accused's right to counsel at a lineup is not wholly apposite. Uncounseled identification procedures are not necessarily unreliable and do not necessarily affect the fact-finding function. Furthermore, this Court has indicated that some violations of the right to counsel are never harmless. Holloway v. Arkansas, 435 U.S. 475 (1978).

One function of the guarantee of due process of law is to protect the reliability and integrity of the guilt-determining process. Violations of that guarantee which detract from the integrity and reliability of the fact-finding function should be carefully scrutinized. Harmless error

rules can work mischief in the event that unreliable yet highly relevant evidence is erroneously presented to the jury. Chapman v. California, supra at 23.

The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. Fahy v. Connecticut, supra at 86-87, Chapman v. California, supra at 23. An error in admitting plainly relevant evidence, having the weight of the victim's identification, is not so insignificant to be conceived of as harmless. Chapman v. California, supra at 23, Parker v. Randolph, 442 U.S. 62 (1979).

(3) THE DETERMINATION BY THE SUPREME COURT OF CONNECTICUT THAT THE ERROR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT COMPORTS WITH THE TESTS EMPLOYED BY THIS COURT.

This court has suggested more than one approach to follow in assessing the harmlessness of error: (1) Focusing on only the erroneously admitted evidence, without regard to other evidence, to determine whether it might have contributed to the conviction, e.g. Fahy v. Connecticut, supra, Chapman v. California, supra; (2) Excluding erroneously admitted

evidence of relatively insignificant prejudicial impact where overwhelming evidence on the issue exists, e.g. Parker v. Randolph, supra; (3) Determining whether the erroneously admitted evidence is cumulative or duplicitous of properly admitted evidence, e.g. Harrington v. California, 395 U.S. 250 (1969).

In dictum, the Supreme Court of Connecticut suggested that, in the absence of a per se rule, it would not find the error harmless. Under any approach, that result would be reached. A victim's identification clearly contributes to a conviction. When it is the only direct identification of the accused, it cannot be said to be insignificant, nor can it be merely duplicitous of other evidence. Furthermore, the Supreme Court of Connecticut found an absence of untainted identification evidence even though the circumstantial evidence may have been sufficient to support a jury verdict. State v. Gordon, supra at 48.

Conclusion

For the foregoing reasons, this Court should find that no question worthy of full review is presented, See, McKenzie v. Montana, ___ U.S. ___, 66 L. Ed. 2d 507, ___ S. Ct. ___ (1980) (Marshall, J. dissenting), and should not issue a writ of

certiorari to the Supreme Court of Connecticut.

Respectfully submitted,

MAXWELL HEIMAN
43 Bellevue Avenue
Bristol, CT 06010
(203) 589-4343
Counsel of Record for
respondent.

Of Counsel:

WILLIAM J. TRACY, JR.
Furey, Donovan & Heiman, P.C.